TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 183.

BROOKE MACKALL, JUNIOR, PLAINTIFF IN ERROR,

vs.

THE CHESAPEAKE AND OHIO CANAL COMPANY.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 17, 1874.

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a In the supreme court of the District of Columbia, the 11 day of May, 1874.

BROOKE MACKALL, JR., *vs.* THE CHESAPEAKE & OHIO CANAL COMPANY. } At law. No. 9042. In error.

Know all men by these presents that we, Brooke Mackall, jr., and Brook Mackall, are bound unto the above-named defendants, or their successors in office, in the sum of five hundred dollars, to be paid to the said defendants, or their successors in office; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this 11th day of May, 1874.

Whereas the above-named Brooke Mackall, jr., hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named Brooke Mackall, jr., shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

B. MACKALL, JR.
B. MACKALL.

Sealed and delivered in the presence of—
SIDNEY T. THOMAS.

Approved May 11, 1874.

A. WYLIE, *Justice.*

(Endorsed:) Filed May 12, 1874. R. J. Meigs, clerk.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief-justice and justices of the supreme court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between The Chesapeake and Ohio Canal Company as plaintiff, and Brooke Mackall, jr., as defendant, at law, No. 9042, a manifest error hath happened, to the great damage of the said Brooke Mackall, jr., as by his complaint appears; and it being fit that the error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf: Therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the United States, this 12th day of May, in the year of our Lord 1874, and of the Independence of the United States the 98th.

[SEAL.]

R. J. MEIGS,
Clerk of the Supreme Court of the Dist. of Col.,
By JOB BARNARD,
Asst. Clerk.

DISTRICT OF COLUMBIA, *to wit:*

To the Chesapeake & Ohio Canal Company:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Brook Mackall, jr., is plaintiff, and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief-justice of the said supreme court of the District of Columbia.

D. K. CARTTER,
Ch'f-Just.

May 12, 1874.

I hereby acknowledge service of the above citation & writ of error.

W. S. COX,
Atty. for Plff., (Deft. in Error.)

(Indorsed:) 9042. Ches. & O. Canal Co. v. Brooke Mackall, jr. Writ of error. Filed May 12, 1874. R. J. Meigs, clerk.

2 The answer of the chief-justice and the justices of the supreme court of the District of Columbia to the foregoing writ of error, is in the words following, to wit:

Declaration.

Supreme court of the District of Columbia.

CHES. & OHIO CANAL COMPANY *vs.* BROOKE MACKALL, JR. } At law. No. 9042. Declaration.

The plaintiff sues the defendant to recover all that part of square No. three (3) in the city of Washington, described as follows, viz: beginning at the end of one hundred and seventy-two feet, measured west, on
3 the south line of H street north, from the northeast corner of said square, and running thence south sixty degrees west about thirty-six feet nine inches; thence south thirty degrees east twelve feet; thence north sixty degrees east twenty feet five inches; thence south thirty degrees east six feet ten inches; thence north sixty degrees east sixteen feet eleven inches, and thence north thirty degrees west eighteen feet ten inches, and thence west to the beginning; of which the plaintiff was lawfully possessed heretofore, to wit, on the first day of July, 1870, when the defendant entered the same and unlawfully ejected the plaintiff therefrom, and unjustly detains the same from the plaintiff.

And the plaintiff claims the possession of said part of square No. three, (3,) with the appurtenances and costs of suit.

W. S. COX,
Atty. for Plff.

4 *Notice to plead.*

The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service hereof; otherwise, judgment.

W. S. COX,
Atty. for Plff.

(Endorsed:) 9042. Ches. & Ohio Canal Co. v. Brooke Mackall, jr. Ejectment. Nar.

The clerk will file and issue as above.

W. S. COX,
Atty. for Plff.

Filed 20th Nov., 1871.

Summons.

In the supreme court of the District of Columbia, the 20th day of November, 1871.

THE CHESAPEAKE & OHIO CANAL CO., PLAINTIFF, *v.* BROOK MACKALL, JR., DEFENDANT. } At law. No. 9042. Summons.

5 The President of the United States to the defendant, greeting:

You are hereby commanded to appear in this court on the first day of its special term, occurring 20 days after service of this writ on you, to answer the plaintiff's suit, and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness D. K. Cartter, chief justice.

R. J. MEIGS, *Clerk.*

W. S. COX.

NOTE.—The special terms of the court commence on the first Tuesday of every month except August, in which month there is no term of the court.

(Endorsed:) Served copies of the declaration, notice to plead, and this summons, on the defendant the 21 day of Novb., 1871.

A. SHARP, *Marshal.*

6 *Plea.*

In the supreme court of the District of Columbia, this day of January, 1872.

CHES. & OHIO CANAL COMPANY *vs.* BROOKE MACKALL, JR. } Plea. 9042. Law.

The defendant, for plea, says he is not guilty as alleged.

L. G. HINE,
Atty. for Deft.

(Endorsed:) Law. 9042. Supreme court D. C. Ches. & Ohio Canal Co. vs. Brooke Mackall. Plea. Filed 2 Jan'y, 1872.

Joinder in issue.

CHES. & OHIO CANAL CO. }
v. } Joinder in issue. 9042. Law.
BROOKE MACKALL, JR. }

The plff. joins issue on the defendant's plea.

W. S. COX,
Atty. for Plff.

Filed Jan'y 8, 1872.

7 *Amended declaration.*

Sup. court, Dist. of Cola.

CHES. & OHIO CANAL CO. }
v. } Amended declaration.
BROOKE MACKALL, JR. }

The plaintiffs further sue the defendant to recover that part of square three (3) in Washington bounded as follows, viz: beginning at the end of fifty-eight and a half measured west on the north line of said square from the northeast corner thereof, and running thence in a straight line to a point on the east line of said square at the end of one hundred and twenty-five feet measured south on said east line from said northeast corner thence on said east line south twenty-three and three-
8 fourths feet, thence due west to the west boundary of said square, thence with said west boundary northwardly to the north line of said square, and thence in a straight line to the beginning, of which the plaintiffs were lawfully possessed heretofore, to wit, on the first day of January, A. D. 1870, when the defendant entered the same and unlawfully ejected the plaintiffs therefrom & unjustly detains the same from the plaintiff.

The plantiffs further sue the defendant to recover that part of said square beginning at the end of one hundred and seventy-five and a half feet measured south on the east line of square from the northeast corner thereof, and running thence on said east line south seven and a half feet, thence due west to the western boundary of said square,
9 thence with said western boundary northwardly to a point due west of the point of beginning, and thence in a straight line to the beginning, of which the plaintiffs were lawfully possessed heretofore, to wit, on the first day of January, A. D. 1870, when the defendant entered the same and unlawfully ejected the plaintiff therefrom and unjustly detains the same from the plaintiff.

The plaintiff further sues the defendant to recover the south half of square number three in Washington, of which the plaintiffs were lawfully possessed heretofore, to wit, on the first day of January, A. D. 1870, when the defendant entered into the same and unlawfully ejected the plaintiff therefrom, and unjustly detains the same from the plaintiff; and the plaintiff claims five thousand dollars damages for said wrong & injury.

W. S. COX, *Atty. for Plaintiff.*

10 (Endorsed:) 9042. Law. Ch. & O. C. Co. v. B. Mackall, jr. Amended nar.

Agreed that the within amendment may be filed, to have the same effect as if part of the original declaration or suit were bro't anew.

W. S. COX, *for Plff.*
L. G. HINE, *Atty. for Deft.*

Filed April 10, 1872.

Amendment to nar, (No. 2.)

CHES. & O. CANAL CO. } Amendment to nar.
v.
BROOKE MACKALL, JR. }

The plaintiffs also claim to recover of the defendant all that property in the city of Washington known as the Mole property, situated at the mouth of Rock Creek, the same consisting of a part of North H
11 street continued, and all that part of square three in said city lying south and west of the bed of the Ches. & Ohio Canal and north of a line drawn east and west through said square at the distance of sixty-three feet from the southern line thereof, of which the plaintiffs were lawfully possessed, when the defendant entered the same and unlawfully ejected the plaintiffs therefrom and unjustly detains the same from the plaintiff.

(Endorsed:) No. 9042. Ches. & O. Canal Co. v. B. Mackall. Amendment to nar. Leave granted. D. K. Cartter, chief-justice. Filed Nov. 20, 1872.

12 *Orders in circuit court.*

TUESDAY, *December* 3, 1872.

Session resumed pursuant to adjournment; Chief Justice Cartter presiding.

THE CHESAPEAKE & OHIO CANAL CO., PLFF., } Orders of circuit court. At law. No. 9042.
vs.
BROOKE MACKALL, JR., DEFT. }

Trial.

And now come as well the plaintiff, by its attorney, Mr. Cox, as the defendant, by his attorneys, Messrs. Hine & Henkle, and a jury of good and lawful men of this District, to wit, William C. Harper, John P. Dennis, Joseph W. Arnold, Edwin Knowles, Henry Thorn, Alexander Garden, Andrew T. McCormick, Henry Johnson, Richard B. Griffin, Thomas S. McNeir, Nicholas S. Shaw, & J. Russell Barr, who being sworn to try the issue above joined; and thereupon the plaintiff,
13 by its said attorney, disclaims the right to recover the southern part of square three, south of a line drawn east and west across the square, at the distance of 120 feet from the center of the square; and the said jury, after the case is given them, retire to their room to consider of their verdict, with permission, if they agree upon a verdict, to reduce the same to writing, sign, seal up, and deliver the same to their foreman, and seperate until the meeting of the court to-morrow.

WEDNESDAY, *December* 4, 1872.

Session resumed pursuant to adjournment; Chief-Justice Cartter presiding.

Verdict and judgment.

THE CHESAPEAKE & OHIO CANAL CO., PLFF.,
v.
BROOKE MACKALL, JR., DEFT. } At law. No. 9042.

And now again come the parties aforesaid, in manner aforesaid,
14 and the said jury come into court, and on their oath say they find the issue aforesaid in favor of the plaintiff for the premises claimed, except that part of square three south of a line drawn east and west at the distance of 120 feet south from the center of the square, besides costs.

Therefore it is considered that the plaintiff recover against the defendant the possession of all that property in the city of Washington known as the "Mole" property, situated at the mouth of Rock Creek, the same consisting of a part of North H street continued, and all that part of square three in said city lying south and west of the bed of the Chesapeake & Ohio Canal and north of a line drawn east and west through said square at the distance of sixty-three feet from the southern line thereof, and $50.15, costs of suit; and have execution thereof.

15 *Order entering bill exceptions.*

SATURDAY, *January* 11, 1873.

Session resumed pursuant to adjournment; Chief-Justice Cartter presiding.

THE CHESAPEAKE & OHIO CANAL CO., PLFF.,
v.
BROOKE MACKALL, JR., DEFT. } At law. No. 9042.

And now again comes the defendant, by his said attorneys, and files his two bills of exception to the rulings of the court on the trial of this cause, duly signed and sealed by the court, and pray that they may be made a part of the record; which is done accordingly.

17 *Bill of exceptions.*

CHESAPEAKE & OHIO CANAL COMPANY
vs.
BROOKE MACKALL, JR.

Be it remembered that on the trial of this case the plaintiffs exhibited a map or plat, exhibiting the premises in controversy and its surroundings, which was conceded to be correct by the defendant, and by consent of parties a small plat or diagram, marked "A," *and* is hereto attached and made part of this bill of exceptions. By which plat it appears that the premises in controversy is a piece of ground 302½ feet long, commencing at a dam at the foot of H street northwest, in the city
of Washington, and running in a southeasterly direction 302½ feet,
18 thence in a westerly direction 175 feet, to the Potomac River; thence along the river in a northwesterly direction 302½ feet;

thence in a' easterly direction 175 feet to the place of beginning; and being 302½ feet long and 175 feet wide. It further appears by said plat that the Washington branch of the canal commences at the dam, northwest corner of said piece of ground, and that it runs along the east side thereof the entire length of said lot of ground and beyond to 17th street, in said city of Washington, a distance of about a half mile.

The plaintiffs, to sustain the issue on their part, then introduced Horatio N. Easby, who testified that this piece of ground was known as the "Mole;" that he had known it ever since it was built by the canal company in 1828 or '29; that it was part of square No. 3 on the
19 plat of Washington City, and was before the canal was built covered with water; that the canal company filled it up from the river back to the canal and built a sea-wall along the river-front. The "Mole" was built on the west side of the canal, and the tow-path was on the east side.

The plaintiffs further proved by the witness Easby, and other witnesses, that the canal company had rented and leased out said "Mole," from about 1830 to 1867, to different persons, for a wharf and other purposes; and upon cross-examination it was proved by the same witnesses that the plaintiffs had never used it for any purpose connected with the canal except to derive revenue therefrom in the way of rents, & except that the same constitutes the west bank of the canal at said point, and is a dam to raise the water of Rock Creek to the
20 necessary height for the use of said canal.

It was also proven upon cross-examination of plaintiffs' witnesses that the canal from the dam of the mole, and along the same, and the entire length of the canal through the city of Washington, from said beginning point to its terminus at 17th street, had for many years been in a condition of dilappidation and decay, and in many places was almost entirely filled up; that the board of public works of the District of Columbia had recently filled up the canal at D street northwest, and built the street over it; and had also filled at G street northwest and built the street over it.

That the plaintiffs had not for many years made any use of that part of the canal above described, nor had it been for many years in
21 condition to be used for the purpose of navigation; but the said canal adjoining said mole was cleaned out and made navigable in 1859, and again in 1870, and a short distance above said mole has always been navigable for large boats.

It was proved by M. B. Herbert, a witness for the plaintiffs, that he had lived in the neighborhood of the mole for 52 years and had been familiar with the canal for 40 years, and that he had not seen a canal-boat in the part of the canal referred to for 15 years, except light scows.

Thomas P. Morgan, a witness for the plaintiffs, testified that he had known the mole since 1849; was in business in the "old stone house," close by. Witness went into possession of the "mole" himself in 1857, and occupied it until 1867. Witness took the lease of the Hart-
22 ford Coal Company, who had used it for shipping coal, and witness used it for general shipping purposes by the consent of the canal company. Part of this time, between 1857 and 1867, it was used by the Government. Witness surrendered possession in 1867, before which Mackall entered on witnesses possession. The canal, from the dam to 17th street, in Washington City, was not navigable for boats for 10 years prior to 1870, except as aforesaid. That the company had used the "mole" for the purposes of the canal, except to lease out to tenants as aforesaid.

The plaintiffs also read the deposition of Walter S. Ringgold, which proved substantially the principle facts testified to by the other witnesses.

The plaintiffs, to further maintain the issue on their part, introduced their paper-title, commencing with the report of the commissioner',
23 and continuing the connecting links in the chain of title down to Hows Goldsborough in 1836, as to the southern portion of the land in controversy, to wit, 120 feet in width, and running from the river to the eastern boundary of the canal, designated upon the accompanying diagram by the words "conveyed by H. Goldsborough to the C. & O. Canal Co.," and then introduced deed from said Goldsborough conveying said tract to the Canal Co. in fee, dated Apr. 22, 1836.

And the plaintiffs, to further maintain the issue on their part, introduced and proved a connected paper-title from the report of the commissioners, down to and in the heirs of Joseph Wilson in January 18, 1830, when they conveyed by deed, in fee-simple, in evidence, to the Chesapeake & Ohio Canal Company, another portion of the prem-
24 ises in controversy, viz, a strip, 26 feet 9 inches wide, running across the land in controversy from the river to the eastern boundary-line of the canal, and designated upon the accompanying diagram by the words "conveyed by Joseph Wilson's heirs to the Chesapeake & Ohio Canal Company."

And the plaintiffs, to further maintain the issue on their part, introduced and produced a connected paper-title, from the report of the commissioners, down to and in the heirs of Walter S. Chandler, and also gave in evidence the record of the proceedings of the circuit court of the District of Columbia, showing that two other portions of the land in controversy were condemned by proceedings in said court for the use of said canal, in perpetuity, and the final confirmation of said proceeding was dated January 19, 1841, viz, a strip running through the
25 controverted land from the river to the eastern boundary-line of the canal, seven feet six inches in width, and designated upon the accompanying diagram by the words "condemned as the property of W. S. Chandler's heirs;" and another portion, being the north part of the controverted tract, viz, being 148 feet 9 inches in width, and running from the river to the eastern boundary-line of the canal, and designated upon the accompanying diagram by the words "condemned as the property of the heirs of Walter S. Chandler."

The foregoing describing and covering the entire land in controversy this suit.

And the plaintiffs, to further maintain the issue on their part, offered, without objection, the act of the legislature of Maryland, dated February 9, 1824, entitled "An act to incorporate the Chesapeake & Ohio Canal Company;" also an act of the Congress of the United
26 States, entitled "An act confirming the act of the legislature of Virginia, entitled 'An act incorporating the Chesapeake & Ohio Canal Company;'" and an act of the State Maryland confirming the same, approved March 3, 1825; also an act of the legislature of Virginia, entitled "An act further to amend the act incorporating the Chesapeake & Ohio Canal Company," passed February 27, 1829, and an act of Congress entitled "An act further to amend the act incorporating the Chesapeake & Ohio Canal Company." Approved March 3, 1837.

And the plaintiffs rested their case.

And the defendant opening his case, it was admitted by the plaintiffs

that the defendant had been in adverse possession of the premises in controversy since about the year 1867, claiming under a tax-title.

And therefore the defendant, to maintain the issue on his part, introduced and had sworn John F. Cook, register of the city of
27 Washington, who is the proper custodian of the records of the tax-sales of said city of Washington, and offered to prove by said witness that the property in controversy was regularly enlisted and entered for taxation, and had been sold for non-payment of taxes, to Joseph N. Fearson, and that a certificate of said sale had been given to said Fearson, and that said Fearson assigned said certificate to the defendant, and said assignment duly entered upon the books of the register aforesaid; which said evidence was objected to by the plaintiffs, and the objection sustained by the court; to which ruling the defendant, by his counsel, excepts, and prays that this his first bill of exceptions may be signed and sealed by the court; which is done, accordingly, this 4th Dec., 1872.

D. K. CARTTER,
Chief-Justice.

28 And thereupon the defendant, to maintain the issue on his part offered to prove a regular and legal tax-title in himself, which was objected to by the plaintiffs, and the objection was sustained by the court; to which ruling the defendant, by his counsel, excepts, and prays that this his second bill of exceptions be signed and sealed by the court; which is done, accordingly, this 4th day of Dec., 1872.

D. K. CARTTER,
Chief-Justice.

(Endorsed:) 9042. Ches. & Canal Co. v. Brooke Mackall, jr. Bill of exceptions. Filed Jan'y 11, 1873. 8-144.

29 *Orders of court in general term.*

TUESDAY, *May* 2, 1873.

Session resumed pursuant to adjournment. Present, Chief-Justice Cartter, and Justices Olin, Wylie, Humphreys, and MacArthur.

CHESAPEAKE & OHIO CANAL COMPANY, PLFF., *vs.* BROOKE MACKALL, JR., DEFENDANT. } Orders court in general term. At law. No. 9042.

The defendant, by his attorney, moves the court here to grant a new trial.

MONDAY, *June 2d*, 1873.

Session resumed pursuant to adjournment. Present, Chief-Justice Cartter and Justices Wylie and MacArthur.

CHESAPEAKE & OHIO CANAL COMPANY, PLFF., *vs.* BROOKE MACKALL, JR., DEFENDANT. } At law. No. 9042.

30 And now come here as well the plaintiff as the defendant, by their respective attorneys; whereupon it is ordered that the defendant's aforesaid motion for a new trial be, and the same is hereby, overruled.

FRIDAY, *April* 24, 1874.

Session resumed pursuant to adjournment. Present, Chief-Justice Carter, and Justice' Olin, Wylie, Humphreys, and MacArthur.

CHESAPEAKE AND OHIO CANAL COMPANY, PLFF., *vs.* BROOKE MACKALL, DEFENDANT. } At law. No. 9042.

And now come here as well the plaintiff as the defendant, by their respective attorneys; and thereupon, because it seems to the court here that there is no error in the record and proceedings of the circuit court, or in its judgment, it is considered that the said judgment be, and the same is hereby, in all things affirmed; and that the plaintiff recover against the defendant the costs of the cause in this court, to be taxed by the clerk.

31 *Clerk's certificate.—Authentication of record.*

Clerk's office, supreme court of the District of Columbia.

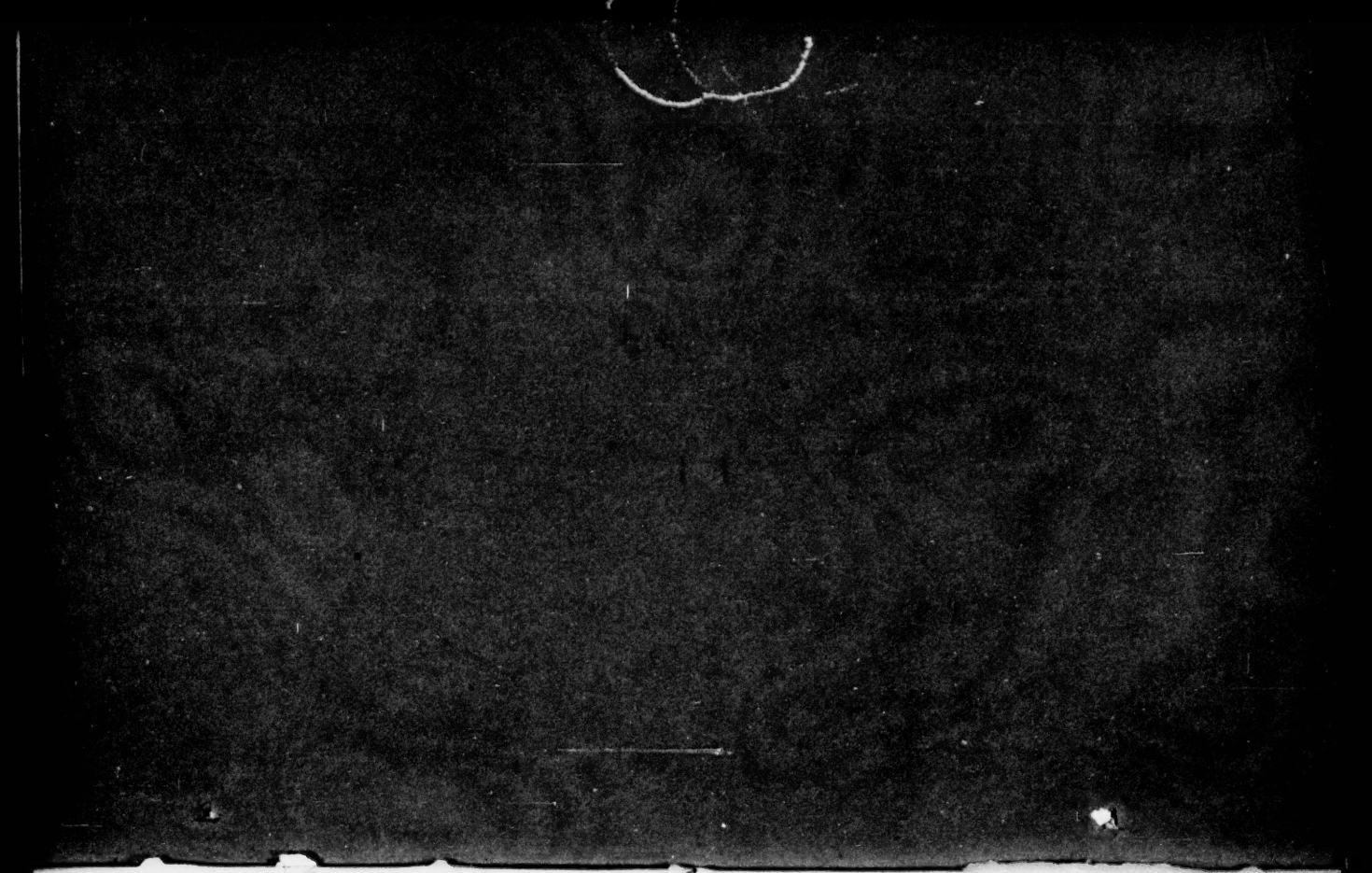
I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 19th day of September, 1874.

[SEAL.]

R. J. MEIGS, *Clerk*,
By JOB BARNARD,
Assistant Clerk.

(Indorsement on cover:) No. 183. Brooke Mackall, junior, plaintiff in error, vs. The Chesapeake and Ohio Canal Company. Dist. of Col. sup. court. Filed 17th October, 1874.



Supreme Court of United States.

BROOKE MACKALL, JR.,
Plaintiff in Error,

vs.

THE CHESAPEAKE & OHIO CANAL CO.

NO. 183.

BRIEF OF PLAINTIFF IN ERROR.

C. INGLE,
of Counsel for Plaintiff in Error.

R. O. POLKINHORN, Printer, Washington, D. C.

Supreme Court of the United States.

BROOKE MACKALL, JR.,
Plaintiff in Error,
vs.
THE CHESAPEAKE & OHIO CANAL CO.

NO. 183.

BRIEF OF PLAINTIFF IN ERROR.

I.—Statement of the Case.

This is an action of ejectment brought by the defendant in error to recover part of square No. 3, in the City of of Washington, D. C. The defendant below claims under "a regular and legal tax-title in himself;" and the whole of his evidence having been rejected by the court below, the cause has been brought into this court by writ of error.

II.—Assignments of Errors.

1. The court below erred in rejecting the evidence offered by the defendant below, for the purpose of proving that the property in controversy was regularly listed

and entered for taxation, and had been sold for non-payment of taxes. R. p. 9.

2. The court below erred in rejecting proof of a *regular and legal* tax-title in the defendant below. R. p. 9.

III.—Points.

The charter of the Chesapeake and Ohio Canal Company authorizes it (sec. 15) to acquire, by purchase or condemnation, such quantity of land as may be "necessary for the making of the said canal," &c.; and *in consideration of* the expense to be incurred, "not only in cutting the said canal, erecting locks and dams, providing acqueducts, feeders, and other works, and in *improving and keeping the same in repair*, the said canal, &c., &c., shall be forever exempt from the payment of any tax, imposition or assessment whatsoever." (Sec. 9.) "The eastern section thereof shall begin at the District of Columbia, on tide water, * * * * and if, after the completion of the said canal and locks, the president and directors shall fail to keep the same in repair for twelve months at any time, then the interest of the company in the navigation and tolls shall cease, and their charter shall be forfeited." (Sec. 21.)

By the Virginia act of February 27, 1829, it is enacted that, "whenever it may be necessary to form heavy embankments, &c., &c., and the president and directors may deem it expedient to give a greater strength to the same by widening them and constructing them of the most solid materials, the ground so formed for such useful purposes may by them, when so improved, be sold out, or let for terms of years;" and that "this act shall be in force, so far as relates to the eastern section of the canal, on its receiving the assent of the legislature of Maryland and of the Congress of the United States."

This act never did receive the assent of the legislature of Maryland.

It appears from the plaintiff's evidence that the property in controversy is 175 feet wide (R. p. 6); that it is not on the tow-path side of the canal; that it was rented out from about the year 1830 to 1867 by the canal company; and that the company had never used the "ground so formed" for any purpose except to derive a revenue therefrom. (R. p. 7.) Also that the canal, along its whole length through the City of Washington, had been in a state of dilapidation and decay, &c., &c., had been filled up in some places, and had not been used for navigation for many years. (R. p. 7.)

1. It is believed that this is the first time a defendant in ejectment ever volunteered to prove a valid legal title in himself and had the mortification of having his services declined. The offer, read by the light of the defendants' next proceeding offer—which forms a part of it—was sufficiently specific and ought not to have been rejected.

2. But the court below, in its first ruling (R. p. 9), must have proceeded upon the idea that, in any event, it was not competent for the defendant to shew that the property in controversy was subject to taxation, at any time, whether before the canal company acquired title or afterwards. It is submitted:

First. That the property in controversy reverted to the grantor by reason of *non-user*.

Hooker v. *Turnpike Co.*, 12 Wend., 371; 2 Kent. Com., Sec. 307.

Angell & Ames, on Corporations, Sec. 776.

Second. Non constat, but that the tax sale was for taxes due before the Canal Company acquired the land, or after their alienation; or after it reverted to the original proprietor in consequence of *non-user*; or because the land was not reasonably required for the purposes of the charter.

Third. The large quantity of land in controversy was not *reasonably* required for the purposes of the charter. In such a case the Circuit Court of the District of Columbia set aside an inquisition for cause shown by the owner.

Chesapeake & Ohio Canal Co., v. *Mason*, 4 Cranch. C. C. R., 123.

Fourth. With regard to the Virginia Act of February 27, 1829, relied on by the defendant in error, it is to be remarked: (1) That it did not enlarge the capacity of the company to take and hold real estate—at least, not beyond what was reasonably necessary for the "useful purpose" specified; and (2) that it was to be in force, so far as relates to the eastern section of the canal, only "on its receiving the assent of the Legislature of Maryland, and of the Congress of the United States.

This language is not to be taken distributively (*reddendo singula singulis*), for the Legislature of Virginia has shewn its care to leave no room for that rule of construction, by the additional clause that the act "shall be valid as relates to both sections on its receiving the further assent of the Legislature of Pennsylvania." Now, this act never did receive the assent of the Legislature of Maryland.

Statutes conferring privileges or powers upon companies or corporations are to be construed strictly, as in derogation of common right. So also, and for the same reason, are laws exempting property from taxation.

Fifth. But, in the next place, the evidence shews that the canal company has not for many years used for the benefit of the public that portion of the canal by reason of which, if at all, it was entitled to acquire, and did acquire, the land in controversy; and, further, that it has failed to keep said portion in repair. Such being the case, and the land being held by the company as a source of revenue only, it ceased to be exempt from taxation; and that, too, although there had been no judicial proceedings for the purpose of enforcing the forfeiture. *Angell & Ames*, Secs. 449, 450. The consideration partially failing, the exemption ceased *pro tanto*.

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Sixth. The liability to forfeiture of the franchise having been incurred, the corporation, as *plaintiff*, cannot prevail in an action *ex delicto*, or in a possessory action; whatever might be the rule as to its right in a private action *against* it, to take advantage of the non-existence of a judicial forfeiture at the instance of the sovereign. In *Hooker* v. *Turnpike Co.*, 12 Wend., 371, it was held that an incorporated company who have abandoned a *portion* of their road have no right to sue for injuries to *that portion*. That to defeat such an action it is not necessary to shew an absolute *forfeiture of the charter;* it is enough if the company have so conducted as to induce the belief that they have abandoned the roads.

The court below, by excluding from the consideration of the jury the proofs offered by the defendant, virtually passed upon all these questions and decided them all against him.

C. INGLE,
of Counsel for Plaintiff in Error.

In the Supreme Court of the U. S.

BROOKE MACKALL, JR.
vs.
THE CHES. AND OHIO CANAL CO. } No. 183.

In this cause it is agreed, that the bill of exceptions taken in the court below ought to shew, that the act of Virginia of January 27th, 1824, entitled, "an Act incorporating the Chesapeake and Ohio Canal Company," was offered in evidence on the part of the defendant in error, and that the tax sale which the plaintiff in error offered to prove, and under which he claimed title, occurred on May 4th, 1864, and it is agreed that the record shall be considered as amended accordingly.

[Signed.] L. G. HINE,
Attorney for Plaintiff.

[Signed.] WALTER S. COX,
Counsel for Defendant in Error.

Supreme Court, United States.

BROOKE MACKALL, JR.,
Plaintiff in Error
vs.
THE CHESAPEAKE & OHIO CANAL COMPANY.

No. 183.

WALTER S. COX,
of Counsel for Defendant in Error.

Supreme Court, United States.

BROOKE MACKALL, JR.,
Plaintiff in Error
vs.
THE CHESAPEAKE & OHIO CANAL COMPANY.

No. 183.

Statement and brief of counsel for Defendant in Error.

This is an action of ejectment.

The property in controversy is the west half of square No. 8 in Washington. In 1828, or 1829, the Chesapeake & Ohio Canal Company constructed a heavy mole or embankment on this ground, which was theretofore under water, in order to dam up Rock Creek into which their canal emptied, in Georgetown, and make it navigable for boats. A dam and lock were also constructed at the northern end of the ground, in connection with further embankments beyond.

At the trial, the plaintiff below proved a complete paper title and also an occupation and enjoyment for thirty-seven years, until three or four years before the commencement of this suit, when the defendant entered upon the possession of a tenant holding under the plaintiff.

A part of the plaintiff's proof was its charter, which consisted of an act of Assembly of Virginia, January 27, 1824, affirmed, as far as this District is concerned, by an act of Congress of March 3, 1825 (4 Stat. at Large, p. 101), the 9th section of which provides, "That for and in consideration of the expenses the said stockholders will be at * * * the said canal and all other works aforesaid, &c., shall be vested, &c., *and be forever exempt from the payment of any tax, imposition or assessment whatsoever.*"

No objection was made to any part of plaintiff's proof, and the only exceptions taken raise no question about it.

On this evidence, if satisfactory to the jury, the plaintiff below was entitled to a verdict, unless the defendant below could shew a better title.

The defendant undertook to shew title out of the plaintiff below and in himself by a tax sale.

He made two offers of proof. The first was to shew that this property was regularly enlisted and entered for taxation; second, that it had been sold for non-payment of taxes to Joseph N. Fearson, and a certificate of sale given to him; and third, that said certificate had been assigned to defendant and the assignment entered on the books of the register.

The facts proven would not have shewn any title whatever in defendant, and consequently were no bar to the plaintiff's recovery.

Independently of the exemption claimed by the plaintiff below, the requirements of the charter of Washington, in order to the passing of a valid tax title, generally, would hardly be shewn to be complied with, in a single particular, by such proof.

The act of Congress of May 15, 1820 (3 Stat., 583),

as amended by act of May 26, 1824 (4 Stat., 75), requires the following facts to appear, to make a valid tax title:

1. An advertisement for twelve weeks.

2. An insertion in each week.

3. A description in it of the property.

4. The name of the person to whom then assessed.

5. A statement of the amount due on each square or lot and the period for which due.

6. The aggregate due in the name of the person.

7. Actual sale for taxes and the payment of the amount of taxes by the purchaser, at the time of sale, and of the residue of purchase money, if any, at the end of two years; and lastly—

8. A deed from the Mayor under the seal of the corporation.

This court, and most, or all others, have held that the onus is on the party claiming under a tax sale to shew a compliance with all legal preliminaries, and that a deed from the collector or other proper officer is not even *prima facie* evidence of title.

See *Rockendorf* v. *Taylor*, 4 Pet. 349.
Early v. *Homans*, 16 How., 610.
Mason v. *Fearson*, 9 How., 248.
Thatcher v. *Powell*, 6 Wheat., 119.
Parker v. *Overman*, 18 How., 137.
Slater v. *Maxwell*, 6 Wall., 269.
Colley on Taxation, p. 326, and cases cited.

Now, it will be seen that the offer which was objected to, embraced none of the requirements of the law above mentioned, except the single fact of the sale. It was objected to and ruled out on this ground, and also another ground to be presently mentioned, because the facts, if true, were no bar to recovery.

The next offer of the defendant below was to show a regular and legal tax title in himself.

The meaning of this offer was to show a compliance, in fact, with the requirements of law as to tax sales, which was not embraced in the first offer.

But this was no answer to plaintiff's evidence.

Either the evidence of the plaintiff established its title or it did not. If the former, the law exempted the property from taxation, and a tax sale of it would be illegal and would pass no title.

If the latter, the evidence offered was totally unnecessary, and was no answer to the plaintiff's proof, but the plaintiff's case failed of itself.

The defendant below might as well have offered to shew title out of the plaintiff and in himself, by a decree in a cause to which the plaintiff below was not a party, or by a decree of a court having no jurisdiction, as by a Court of Probate or a Justice of the Peace.

The act of Congress made the Virginia act the law of this District, and the exemption of the Company's property from taxation, and consequently from sale for taxes, is too plain to be the subject of argument.

WALTER S. COX,
of Counsel for Defendant in Error.

As to effect of non user, see
Canal Co. v R. R. Co. 4 G & J 1
Regents, &c v Williams 9 " 365
Hamilton v Annapolis R. R. Co. { 1 Md. Ch. 107 / 1 Md. R. 553
Adams v Beach 6 Hill 107
Tower v Hale 46 Barb. 361

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[Signed.] L. G. HINE,
Counsel for Plaintiff.

[Signed.] WALTER S. COX,
Counsel for Defendant in Error.